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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

## No. 176

WATERMAN STEAMSHIP CORPORATION,
a corporation,
*Petitioner,*

vs.

TRIPLE A MACHINE SHOP, INC.,
a corporation,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.**

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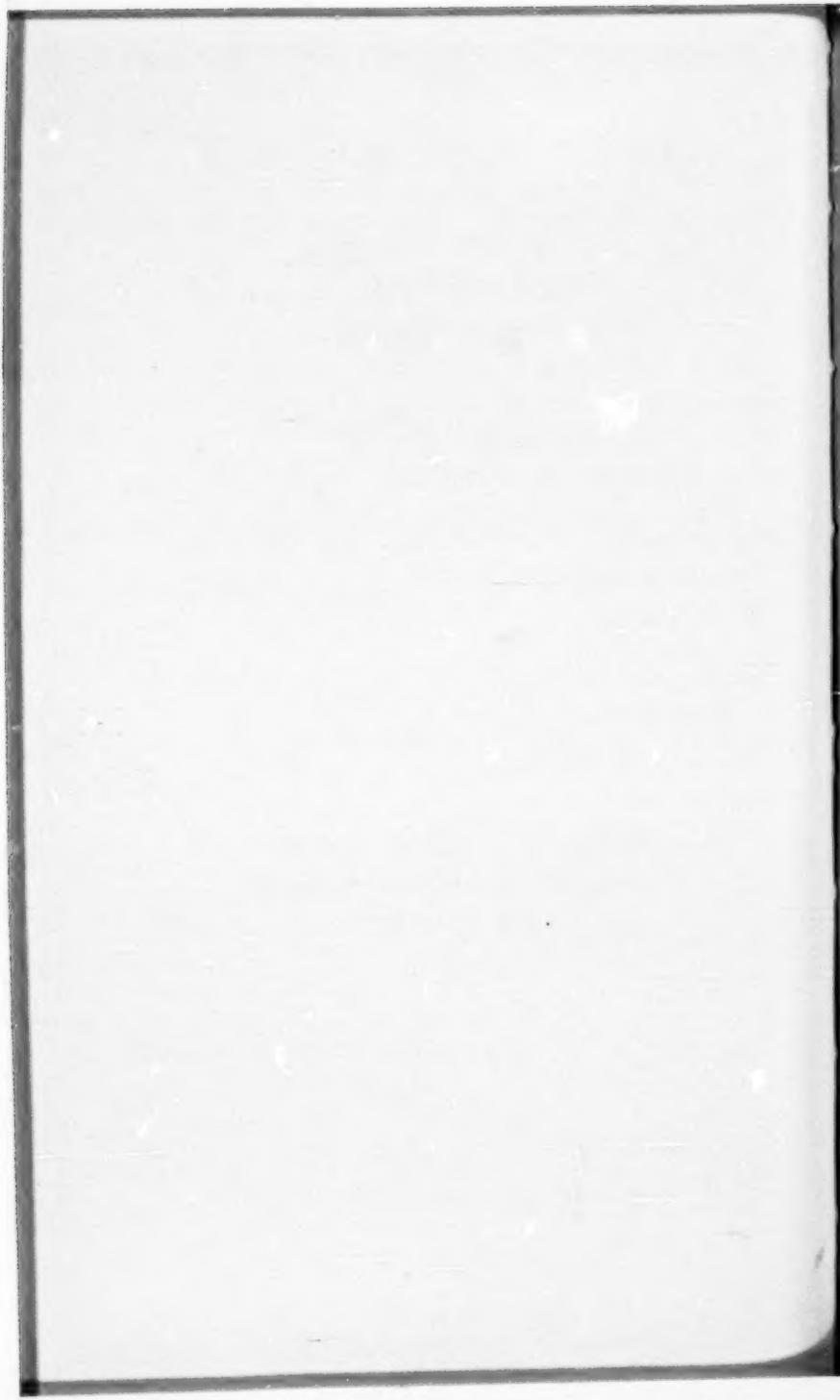

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### OPINIONS BELOW.

The opinion of the Court of Appeals, appearing at page 166 of the certified record, was rendered and filed on April 25, 1955, is set forth in the appendix hereto, and is reported at 221 Fed. 2d 916.

## JURISDICTION.

(a) The judgment of the Court of Appeals for the Ninth Circuit reversing the interlocutory decree of the District Court for the Northern District of California, Southern Division, was dated and entered on April 25, 1955.

(b) Petition for rehearing, timely filed on May 23, 1955, was denied by the Court of Appeals on May 31, 1955. The Court of Appeals has stayed its mandate pending the filing and consideration of this petition for writ of certiorari but no extension of time within which to file this petition for certiorari has been sought or granted.

(c) Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals by Title 28 USC 1254(1), this petition for certiorari being filed within the time prescribed by Title 28 USC 2101(c).

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## QUESTION PRESENTED.

The primary question presented for review is whether an appeal in admiralty where the testimony before the District Court was in part oral and in part by deposition may be treated by the Court of Appeals as a trial de novo, or whether the standard of review as stated in Rule 52(a) of the Federal Rules of Civil Procedure, which treats trial court findings as final in the absence of clear error, applies to admiralty cases as well as other civil cases. There is a conflict on this question in the opinions of this Court and in the opinions of the Courts of Appeal for the several maritime circuits, some of which hold that findings of the trial court may be set aside only if clearly

erroneous, while the Ninth Circuit holds that an admiralty appeal results in a trial de novo.

If the courts of appeal in admiralty cases may exercise no greater scope of review than that permitted under Rule 52(a) of the Federal Rules of Civil Procedure in civil cases, the further question is presented whether the Court of Appeals in the present case exceeded such permissible scope of review in rejecting the findings made by the trial court based on uncontradicted substantial evidence and in substituting therefor other inferences based on testimony rejected by the trial court.

No secondary question is presented if the Court of Appeals may properly treat an admiralty appeal as a trial de novo, for in such event no contention is made that the Court of Appeals erred in a question of law.

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## STATEMENT OF THE CASE.

Petitioner, owner of the SS JEAN LAFITTE, brought this action to recover damages suffered by it, including detention and general average items, resulting from a fire aboard the vessel at San Francisco, August 2, 1952. Jurisdiction of this admiralty matter was vested in the District Court under Article III, Section 2 of the United States Constitution and Title 28 USC 1333(1); jurisdiction of the Court of Appeals existed under Title 28 USC 41, 1292(3), 1294 and 2107 respondent having filed its notice of appeal within fifteen days from the entry of the District Court's interlocutory decree in petitioner's favor.

Before 6:00 P.M. on August 1, 1951 at the Oakland Army Base on San Francisco Bay, the No. 1 hold of the SS JEAN LAFITTE had been completely loaded with bales of Army clothing and the hatch closed with pontoon-type covers and covered over with canvas tarpaulins but not battened down (R. 15).* On the following day, August 2, 1951, at about 5:00 P.M., the vessel having shifted across the bay to San Francisco, respondent's employees commenced work at the after end of No. 1 hatch to install a winchman's platform, using an oxy-acetylene torch to burn through two angle bar railings and an upright which were located on the main deck immediately aft of No. 1 hatch. At about 7:00 P.M. and after they had completed the burning operation but before they had installed the winchman's platform, respondent's employees discovered there was a fire in the No. 1 hold. Upon removal of the pontoon hatch covers, as testified by the Fire Department Battalion Chief (R. 60), the fire was discovered in the very top level of the cargo of Army clothing at the middle of the after hatch coaming directly adjacent to the place where respondent's employees had been burning with an oxy-acetylene torch and directly under an aperture between the after pontoon and after hatch coaming through which sparks would have fallen to the cargo unless the aperture remained covered by tarpaulins (photographs R. 157, 159, 160).

Petitioner at the trial before the District Court produced substantial oral evidence which negatived smoking by longshoremen on the previous day before the hatch

*Numbers in parentheses refer to pages of the printed record, petitioner having elected to file copies herewith under Rule 21(4).

was closed and evidence which eliminated as reasonably possible causes of the fire all causes except the oxy-acetylene burning performed by respondent's employees shortly before the fire was discovered. The deposition testimony of respondent's employees as to the manner in which they performed the work of burning would, if believed, have similarly excluded it as a cause of the fire, but the trial court rejected the testimony of respondent's employees because of critical conflicts in their testimony on other points, and accepted instead the contrary inference arising from petitioner's evidence.

The Court of Appeals on its reading of the record was not satisfied that the fire had not been caused by a cigarette butt dropped by a longshoreman at the Oakland Army Base on the previous day, although all testimony in the record negatived this possibility, and additionally inferred that sparks had not entered the hold because there were no burns on the tarpaulins (despite the fact that it would have been physically impossible for sparks entering the hatch to have burned the tarpaulins if, as inferred by the trial court, the tarpaulins at that time had been pulled forward on the pontoons).

The Court of Appeals did not find that either the judgment or the findings of the District Court were clearly erroneous but based its reversal of the District Court on the reweighing and re-evaluating of the testimony heard and considered by the trial court and treated the matter as a trial de novo. The Court of Appeals, as on a trial de novo, concluded, "* * * we think that the shipowner did not sustain its burden of proof that the fire injuring the ship's structure was started by the use of the acetylene torch."

## ARGUMENT.

### (a) UNCERTAINTY AS TO PROPER STANDARD OF REVIEW IN ADMIRALTY APPEALS.

The Court of Appeals for the Ninth Circuit in the present case treated its review of the trial court's judgment and findings as a trial de novo and reversed the District Court, even though it was not determined that the judgment or findings of the District Court were clearly erroneous.

There is a substantial divergence among the circuits as to the proper scope of review to be applied by a court of appeals in an admiralty case. Additionally, the apparent direct conflict between this Court's earlier opinions on the subject and its most recent expression requires settlement and clarification by this Court of the proper standard of review to be applied in admiralty appeals.

#### (1) Conflict among Supreme Court cases.

This Court's most recent expression as to the proper standard of review to be applied in an admiralty appeal appears in *McAllister v. United States* (1954), 348 U.S. 19, in which this Court stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

Rule 52(a) F.R.C.P. in pertinent part provides:

"(a) • • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

Conversely in *Brooklyn Eastern District Terminal v. U.S.A.* (1932), 287 U.S. 170, 176, and after the adoption of Admiralty Rule 46½ in 1930, this Court stated:

"In admiralty an appeal to the Court of Appeals is deemed to be a trial de novo."

A trial de novo is defined:

"Trial de novo: A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below." *Black's Law Dictionary*, 3rd Edition, page 1756.

Prior opinions of this Court similarly stated that an admiralty appeal was treated as a trial de novo in the Court of Appeals, *Irvine v. The Hesper* (1887), 122 U.S. 256; *Watts, Watts & Co. v. Unione Austriaca di Navigazione* (1918), 248 U.S. 9; *Reid v. Fargo* (1916), 241 U.S. 544; cf. *McCrea v. U. S.* (1935), 294 U.S. 382.

Clarification and settlement by this Court is required as to whether by its decision in the *McAllister* case it intended to place admiralty appeals on a precise parity with appeals in civil cases.

**(2) Conflict among the circuits.**

The several maritime circuits have expressed the standard of review to be applied in an admiralty appeal as follows:

*First Circuit:* Expressly acknowledges standard stated in F.R.C.P. 52(a) that findings of the trial court may be

set aside only if clearly erroneous. *Boston Insurance Co. v. Dehydrating Process Co.* (1953), 204 Fed. 2d 441, 444.

*Second Circuit:* Expressly acknowledges standard stated in F.R.C.P. 52(a). *Petterson Lighterage & Towing Corp. v. New York Central Railroad Co.* (1942), 126 Fed. 2d 992, 995; *Union Carbide & Carbon Corp. v. United States* (1953), 200 Fed. 2d 908, 910.

*Third Circuit:* The standards of review applied in the Third Circuit are stated in *Crist v. U. S. War Shipping Administration,* 163 Fed. 2d 145, 146:

> "• • • an appeal in admiralty partakes of a trial de novo and serves to vacate the decree of the District Courts; that the findings of the latter when supported by competent evidence are entitled to great weight and that such findings should, therefore, not be set aside on appeal except upon a showing that they are clearly wrong. *The S.C.L. No. 9,* 3 Cir., 114 Fed. 2d 964, 966. The basis of the latter rule is 'that the trial judge has a peculiar opportunity for appraising the worth of oral testimony by observing the witnesses' demeanor which the cold print of the record fails to disclose'. *The S.C.L. No. 9,* supra. The rule is modified where the findings of the district court are based wholly on depositions. *Matson Nav. Co. v. Pope & Talbot, Inc.,* 9 Cir., 149 Fed. 2d 295."

*Fourth Circuit:* The standard of review applied by the Court of Appeals for the Fourth Circuit is stated in *Hodges v. Standard Oil Co. of New Jersey* (1941), 123 Fed. 2d 362, 363:

> "There is no better established principle of admiralty law than that questions of fact, resolved by a trial judge on conflicting evidence, are entitled to great

weight and will not be reversed except for plain error."

*Fifth Circuit:* Expressly acknowledges standards stated in F.R.C.P. 52(a). *C. J. Dick Towing Co. v. The Leo* (1953), 202 Fed. 2d 850, 854.

*Sixth Circuit:* The Sixth Circuit appears to acknowledge standards of review substantially the equivalent of those stated in F.R.C.P. 52(a) in *Wilkes v. Mississippi River Sand & Gravel Co.* (1953), 202 Fed. 2d 383, 387:

"• • • this court is bound by the findings of fact of the District Judge, if they are supported by substantial evidence and are not clearly erroneous • • •"

*Seventh Circuit:* Although the Court of Appeals for the Seventh Circuit for many purposes apparently regards an admiralty appeal as a trial de novo, it also tacitly acknowledges the standards of review as stated in F.R.C.P. 52(a), as stated in *Kroehler v. United States* (1951), 187 Fed. 2d 933, 936:

"Hundreds of citations might be given where the rule is categorically stated that on an appeal in admiralty there is a trial de novo; however, the qualification of that general rule is just as widely recognized, and that is, that the findings of the district court will be accepted by the appellate court unless clearly against the preponderance of the evidence."

*Ninth Circuit:* The Court of Appeals for the Ninth Circuit, has variously stated the standard of review to be applied in admiralty cases as in *U. S. v. Wilhite* (1947), 1948 AMC 687, and *Kulukundis v. Strand* (1953), 202 Fed. 2d 708. Despite the language in *City of Long Beach,*

*et al. v. American President Lines* (9 Cir. decided June 14, 1955, not yet reported), the Court of Appeals for the Ninth Circuit subsequent to the decision of this court in the *McAllister* case has not consistently applied to admiralty cases the standards of review stated in FRCP 52(a). As recently as December 14, 1954 the Court of Appeals for the Ninth Circuit in *City of Portland v. Luckenbach SS Co.,* 217 Fed. 2d 894, 897, indicated that in an admiralty case it was free to set aside the findings of the trial court on a belief of error "something short of clearly erroneous".

The present case, decided April 25, 1955 in which six of the eight witnesses were heard by the trial court and only two by deposition confirms that the Court of Appeals for the Ninth Circuit has not accepted in admiralty cases the standards of review stated in F.R.C.P. 52(a).

The standard of review applied in admiralty cases by the Court of Appeals for the Ninth Circuit is as stated in the following quotation from respondent's brief filed with the Court of Appeals in the present case:

> "The leading case on the weight to be accorded the trial Court's findings in an admiralty appeal is this Honorable Court's decision in *The Ernest H. Meyer,* 84 F. (2d) 496 (9 Cir. 1936). That case laid down the rule as follows:
>
> > 'The well established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence. In so weighing the evidence, it is not weighed with the end in view of determining whether a part of the evidence war-

rants an inference supporting the finding. We must weigh *the whole evidence* • • • In such weighing of the evidence we are required to make our independent "examination, thought and judgment" just as did the Supreme Court in *The Ariadne,* 13 Wall. 475, 20 L. Ed. 542.' 84 F. (2d) at pp. 500-501. (Emphasis by the Court.)

"*The Ernest H. Meyer* also points out that where the testimony is largely by deposition, the presumption in favor of the lower Court's findings is of lesser weight and more easily rebutted.

'The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight, but such rule is modified where the findings are based wholly upon depositions (citing cases). In cases in which witnesses testify in open court and depositions are also introduced, the rule is subject to modification in the sound judgment of the appellate court.' *Matson Navigation Co. v. Pope & Talbot,* 149 F. (2d) 295 at 298 (9 Cir. 1945).

'In *U. S. v. Lubinski,* 9 Cir., 153 F. (2d) 1013, 1014, where "the testimony was partly oral and partly by deposition," we said, "we give weight to the findings of the trial court as our judicial discretion dictates." The evidence before us being both oral and documentary, we apply the same rule as in a case where the "testimony was partly oral and partly by deposition," and give such weight to the findings as our judicial discretion dictates.' *Tawanda v. U. S.,* 162 F. (2d) 615 at 617 (9 Cir. 1947)."

It is apparent that the Ninth Circuit in admiralty appeals gives less effect to the judgment and findings

of the trial court than do the First, Second and Fifth Circuits and probably less than the Third, Fourth, Sixth and Seventh Circuits. The scope of review applied by the Court of Appeals for the Ninth Circuit in admiralty cases patently exceeds the standard sanctioned by literal reading of the Supreme Court's opinion in the *McAllister* case, supra.

The question of the standard of review in admiralty cases is an important one which requires settlement and clarification by this Court, for as matters now stand either the First, Second and Fifth Circuits are too stringently limiting their review in such cases or the Ninth Circuit is reviewing such cases on too broad a basis, with the possibility that the First, Second, Fifth and Ninth Circuits may all be in error and the proper standard be an intermediate one as expressed in the Third, Fourth, Sixth or Seventh Circuits.

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**(b) THE COURT OF APPEALS IN THE PRESENT CASE ERRED IN REVERSING THE TRIAL COURT IF IN AN ADMIRALTY APPEAL THE PROPER STANDARD OF REVIEW IS AS STATED IN RULE 52(a) FEDERAL RULES OF CIVIL PROCEDURE AND NOT AS ON A TRIAL DE NOVO.**

If an appeal in an admiralty case presents the case to the Court of Appeals as on a trial de novo, the present case presents no error of sufficient general interest to merit review by this Court on certiorari.

On the other hand, if the proper standard of review in an admiralty appeal is as stated in F.R.P.C. 52(a) and as indicated on a literal reading of this Court's opinion in the *McAllister* case, the error in the standard of review applied by the Court of Appeals in the present

case is a grave one which highlights a diversity in federal admiralty law as applied by the different circuits and which requires correction by this Court and corresponding settlement and clarification to prevent the recurrence of such errors and the taking of appeals in admiralty cases in reliance on the assumption that such appeal may afford a review in the nature of a trial de novo.

In the present case, the trial court found that the evidence excluded all reasonably possible causes of the fire with the single exception of the negligence of respondent's employees. In the factual context of the case the trial court found that respondent's employees had raised a tarpaulin during their work permitting sparks of incandescent metal produced by oxy-acetylene burning to fall through an aperture between the after pontoon and the after hatch coaming onto the cargo in No. 1 hold causing the fire in question.

The trial court found that smoking by longshoremen in the hold on the previous day before the hatch was closed was not a reasonably possible cause of the fire in view of the substantial evidence that Army regulations prohibited smoking in the holds and adjacent areas of vessels loading at the Oakland Army Base (R. 72), that military police vigorously enforce such regulations (R. 20), that longshoremen do not smoke on vessels at the Oakland Army Base (R. 15) and that none was seen to smoke during the loading of the vessel (R. 15). The Court of Appeals reviewed the record de novo and rejected the trial court's finding which was based on substantial evidence and substituted in lieu thereof the finding that there was a "not remote possibility that a long

smouldering fire was started by a burning cigarette butt dropped by one of the fourteen stevedores" before the hatch was closed on the previous day, although there was no evidence that any longshoremen had smoked.

Similarly, the Court of Appeals from the evidence that there were no burns on the tarpaulins which had been used to cover No. 1 hatch inferred that no sparks from the oxy-acetylene burning operation had gone over the hatch or entered the hold through the aperture between the pontoon cover and the hatch coaming. As the photographs (R. 157 and 159) clearly show, the hatch pontoon cover extended some six to seven inches above the top of the hatch coaming (and above the aperture between the hatch coaming and the pontoon). Contrary to the "required inference" on which the Court of Appeals bases its reversal of the trial court, the absence of burn marks on the tarpaulins not only does not tend to prove that sparks did not enter the hold to cause the fire but in fact it *was physically impossible for the spark or sparks which caused the fire to touch the tarpaulin* when the tarpaulin was thrown back on top of the hatch as inferred by the trial court from the substantial evidence excluding all other reasonably possible causes of the fire.

It is not our purpose to suggest that this court should weigh the relative merit of the inferences drawn by the District Court and by the Court of Appeals. We urge only that the standard of review applied by the Court of Appeals in the present case in reversing the trial court was erroneous if the proper standard of review permits the judgment and findings of the trial court to be set aside only if clearly erroneous.

## CONCLUSION.

In light of the considerations hereinabove expressed, it is respectfully submitted that certiorari should be granted in the present case to settle and clarify the standard of review in admiralty appeals and to settle conflicts presently existing among the circuits; it is further respectfully submitted that at the present day there is no reason for admiralty appeals to be subject to a different standard of review than other civil cases and that accordingly the decision of the Court of Appeals should be reversed being erroneously founded on a review by the Court of Appeals of the District Court's findings and judgment as on a trial de novo.

Dated, San Francisco, California,
June 21, 1955.

CHALMERS G. GRAHAM,
*Proctor for Petitioner.*

GRAHAM, JAMES & ROLPH,
FRANCIS L. TETREAULT,
*Of Counsel.*

CERTIFICATE OF SERVICE.

I, CHALMERS G. GRAHAM, Proctor for Waterman Steamship Corporation, Petitioner, and a member of the bar of the Supreme Court of the United States hereby certify that on the 21st day of June, 1955, I served copies of the foregoing Petition for Writ of Certiorari on proctors for respondent by mailing copies to their office in duly addressed envelope with first-class postage prepaid.

Dated, San Francisco, California,
June 21, 1955.

CHALMERS G. GRAHAM

**(Appendix Follows.)**